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[redacted] Petitioner,

vs.

[redacted] Respondent.

[redacted]

[redacted]

[redacted]

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# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1964**

## No. 202

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EDDIE DEAN GRIFFIN,

*Petitioner,*

*vs.*

STATE OF CALIFORNIA,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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## ANSWER TO RESPONDENT'S BRIEF IN OPPOSITION

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Respondent State of California relies on the overruled cases of *Twining* v. *New Jersey*, 211 US 277, and *Adamson* v. *California*, 332 US 46.

Those cases have already been squarely overruled by *Malloy* v. *Hogan*, 378 US 1 (1964). While *Malloy* v. *Hogan* involved another State, we believe the answer in that case was clear that the provisions of the Fifth Amendment against compulsory self-incrimination is protected by the Fourteenth Amendment and Article I, Section 13 of the Constitution of California, which was re-enacted by statute in Section 1323 of the Penal Code of California, was and is in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

In his admirable dissent in *Adamson* v. *California* in 332 US at 69, Mr. Justice Black said:

> "The Twining case was the first, as it is the only, decision of this Court in which is squarely held that states were free notwithstanding the Fifth and Fourteenth Amendments to extort evidence from one accused of crime."

The learned analysis of the *Twining* case and the provisions of the Fifth and Fourteenth Amendments is clearly set forth in that dissenting opinion by Mr. Justice Black and is a complete answer to the argument now presented.

*Adamson* was a California case involving similar issues to *Griffin*, but *Adamson* was wrongly decided and should now be squarely overruled as it was in *Malloy* v. *Hogan*, *supra*.

As Mr. Justice Black says in *Adamson* v. *California*, 332 US at 89:

> "I cannot consider the Bill of Rights to be an outworn 18th Century 'straitjacket' as the Twining opinion did. Its provisions may be thought outdated abstractions by some. And it is true that they were designed to meet ancient evils but they are the same kind of human evils that emerge from century to century where excessive power is sought by the few at the expense of the many. In my judgment the people of no nation can lose their liberty so long as the Bill of Rights like ours and its basic purposes are conscientiously interpreted, enforced and respected so as to afford continuous protection against old as well as new devices and practices which thwart those purposes . . . I would follow what I believe was the original purpose of the Fourteenth Amendment, to extend to all the people of the nation the complete protection of the Bill of Rights."

To permit comment on the failure of a defendant to testify is to force and extort testimony from him and abuse the very privilege which the Constitution and statutes give to him as a sword to convict him. No other consequences can follow.

Mr. Justice Murphy, in his dissent in *Adamson* v. *California*, joined in by Mr. Justice Black, says (332 US 124, 91 L.ed. 1946):

> "That point, however, need not be pursued here inasmuch as the Fifth Amendment is explicit in its provision that no person shall be compelled in any criminal case to be a witness against himself. That provision, as Mr. Justice Black demonstrates, is a constituent part of the Fourteenth Amendment.
>
> "Moreover, it is my belief that this guarantee against self-incrimination has been violated in this case. Under California law the judge or prosecutor may comment on the failure of a defendant in a criminal trial to explain or deny any evidence or fact introduced against him. As interpreted and applied in this case, such a provision compels a defendant to be a witness against himself in one of two ways:
>
> "1. If he does not take the stand his silence is used as a basis for drawing unfavorable inferences against him as to matters which he might reasonably be expected to explain. Thus he is compelled, through his silence, to testify against himself and silence can be as effective in this situation as oral statements.
>
> "2. If he does take the stand, thereby opening himself to cross-examination, so as to overcome the effects of the provision in question, he is necessarily compelled to testify against himself. In that case his testimony on cross-examination is the result of

> coercive pressure of the provision rather than his own volition. . . .
>
> "This guarantee of freedom from self-incrimination is grounded on a deep respect for those who might prefer to remain silent before their accusers. To borrow the language from Wilson v. United States, 149 US 60, 66, 37 L.ed. 650, 651, 13 S.Ct. 765, 'It is not everyone who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not everyone, however honest, who would, therefore, willingly be placed on the witness stand.'
>
> "We are glad to give effect to the principle of freedom from self-incrimination. That principle is as applicable where the compelled testimony is in the form of silence as where it is composed of oral statements."

The discussion by the respondent that the California constitutional provision "is narrow and goes only to the weight which may be afforded to evidence presented in the case against the defendant, which he fails to explain or deny by his testimony", is an admission that the provision itself is a bad provision and that an attempt to evade a constitutional mandate of our country against self-incrimination has been limited to the narrow scope. However narrow it may be, it is still in violation of those fundamental principles of justice and fair play which inhere in our country's proceedings against self-incrimination.

The third argument of the respondent that a limited comment "operates to the benefit of a defendant" avoids the

proposition that this benefit, if it is possible in any case, is one which the defendant himself may choose or reject under the provisions of the Fifth and Fourteenth Amendments. Of course, a defendant who feels that he may be benefited under any situation can waive a constitutional right and guarantee but that choice is to him and not as to the State which compels him to choose, under any circumstances.

The fourth argument made by the respondent is that even though the comment is barred by the Fifth Amendment, "petitioner has shown no prejudice meriting reversal."

This is a surprising argument coming from the People of the State of California since this Court has repeatedly held that where rights under the Constitution of the United States have been violated, the question of prejudice or no prejudice is not one in which this Court determines that constitutional issue.

*Chambers* v. *Florida*, 309 US 227, 84 L.ed. 716;
*Lisenba* v. *California*, 314 US 219, 86 L.ed. 166;
*Mooney* v. *Holohan*, 294 US 103;
*Tot* v. *United States*, 219 US 463, 467;
*Bram* v. *United States*, 168 US 532, 42 L.ed. 568.

Furthermore, this Court in *Faye* v. *Connecticut*, 375 US 85, 11 L.ed. 2d 191, rejected the harmless error rule which has been urged by the People.

This Court has held in the confession cases, and even a majority has said, that in a confession case "It may well be that a confession is never to be considered as non-prejudicial." To paraphrase this argument we may say that evidence which is extorted or compelled on the witness stand is tantamount to confession and is not to be considered as non-prejudicial.

In *Lisenba* v. *California*, 314 US 219, 237, this Court itself commented on the fact that if evidence would be extorted in open court it would be in violation of due process. What could be more an extortion of evidence in open court than Article I, Section 13 of the Constitution of California and its parallel Penal Code sections which carry out its provisions. The opinion of Mr. Justice Murphy, concurred in by Mr. Justice Black in *Adamson* v. *California*, clearly demonstrates this point.

The admission of evidence concerning the alleged assault in Mexico on which the defendant was there acquitted was in violation of general principles of full faith and credit given to judgments of other states and other countries.

California itself has a statute which provides as follows:

> "Section 656, Penal Code. Acquittal or Conviction Under Foreign Law.
>
> "Whenever on the trial of an accused person it appears that upon a criminal prosecution under the laws of another state, government, or country, founded upon the act or omission in respect to which he is on trial, he has been acquitted or convicted, it is a sufficient defense."

See also:

> 7 Cal.Jur. 958;
> 16 Corpus Juris 239, 258, 282;
> 8 RCL 136;
> West's WSCL Crimes, Sec. 48.

Mexico is a favored nation under treaty and the acts of its courts are entitled to full faith and credit in the United States the same as the State of California.

In *Hughes* v. *Fetter*, 341 US 609, 95 L.ed. 1212, Mr. Justice Black, writing for the Court, said that local policy must yield to the constitutional requirements that full faith and credit must be given in each state to the public acts of any other state. Under the equal protection clause, we believe that the same must apply to foreign decisions and foreign judgments in other countries. The vice of the California procedure in this case was that it nullified full faith and credit to the acts of the Mexican court. In addition, it is fundamentally unfair and not in accordance with standards of American justice.

We believe that the full faith and credit clause of Article IV, Section 1 of the Constitution of the United States, must be extended to Mexico.

Furthermore, we believe that in permitting the evidence in the California court also violated due process of law under the Fourteenth Amendment to the Constitution of the United States since it failed to follow its own provisions of its own Penal Code section commanding that this be done, Section 656, Penal Code of the State of California,

Section 668 of the Penal Code of California requires California to recognize judgments in other countries for consideration as to whether they constitute a prior conviction of a felony. The same effect should be given to an acquittal, therefore, as would be given to a conviction. See Section 668 of the Penal Code of the State of California.

The attempt by the State of California to divide the case into a philosophy of penology becomes irrelevant if the constitutional provisions of full faith and credit and due process were violated. Furthermore, there can be but one judgment in a case and one ultimate decision and this must be the result of fundamental fairness in the treatment of

the accused. The treatment accorded here was fundamentally unfair.

We respectfully submit that under the evidence here, the evidence is entirely devoid of evidentiary support to sustain the judgment.

We therefore pray for reversal of the judgment below and an order dismissing the indictment.

Respectfully submitted,

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